Michael G. Adams • 7: 202-695-8300 • f: 202-695-8320 • www.cpblawgroup.com

2017 JAN -6 PM 2: 03

January 6, 2017

CELA

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Hon. Kathryn Ross
999 E Street, NW
Washington, DC 20436

Re: MUR 7197 - Response of Respondents Eric Greitens, Greitens for Missouri, and Jeff Stuerman, its Treasurer

SENT VIA EMAIL AND U.S. MAIL

Dear Commissioners and Staff:

Governor-Elect Eric Greitens, Greitens for Missouri, and Jeff Stuerman, its treasurer (hereinafter "Respondents"), hereby respond to the Complaint filed by Crystal Brinkley in Matter Under Review 7197. For the reasons set forth herein, the Commission should find no reason to believe that Respondents have violated the Federal Election Campaign Act, as amended (the "Act"), and accordingly should dismiss the Complaint.

Mr. Greitens was a candidate for Governor of Missouri in the 2016 election. His campaign committee, Greitens for Missouri, accepted contributions from sources and in amounts as permitted by Missouri law.

The Complaint alleges that, with such non-Federal funds, "Greitens for Missouri paid for a communication that include[d] a photograph of Vice Presidential candidate Mike Pence with the following message: VOTE NOVEMBER 8^{TII} [/] TRUMP [/] PENCE[.]" The Complaint selectively quotes the mailer's content, neglecting to note that Pence is pictured standing next to Greitens, and further neglecting to note that "TRUMP" and "PENCE" are followed by "GREITENS [/] GOVERNOR," "Mike Parson for Lieutenant Governor," and then "ERIC GREITENS" in gigantic capital letters, followed in turn by extensive information about Greitens and his positions on state issues. In any event, the mailer as depicted in the Complaint's Exhibit A speaks for itself.

The essence of the Complaint's two claims, then, is that photographic depiction of Pence on the mailer was impermissible, as well as the stray reference to Trump and Pence in the mailer's

The photograph depicting Pence is "with" additional language referencing Trump and Pence, in the sense that both the photograph and the language appear on the same page of the mailer, in separate sections adjacent to one another.

exhortation to vote for non-Federal candidates (in the context of a paid communication extensively discussing the non-Federal candidacy of Greitens).²

Indisputably, the Act prohibits a non-Federal candidate or agent of same from spending non-Federal funds for "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office[.]"³ The question is whether the mailer should be deemed (consistent with Commission precedent) as having done so, and even if so, whether that constitutionally could be the basis for an enforcement action.

Prior advice and action by the Commission suggests that incidental reference to a Federal candidate does not violate the Act. First, as to the photograph of Greitens with Pence, in Advisory Opinions 2003-25 (Bayh) and 2007-34 (Jackson), the Commission opined that public communications (prominently) Featuring Federal candidates supporting non-Federal candidates would not violate the Act. In Bayh, the Commission noted that "[u]nder the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate," and even quoted a principal sponsor of the legislation enacting the provision at issue, Senator Russ Feingold, who explained in congressional debate that this provision "would not prohibit 'spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they publicly identify with a position of a named Federal candidate...." The mailer's photograph of Pence appearing with Greitens should be seen in this light. It is simply a depiction of Greitens appearing with Pence, not an expression of support or promotion of Pence's candidacy.

Concededly, the "VOTE NOVEMBER 8^{TII"} language appearing over the words "TRUMP PENCE GREITENS GOVERNOR Mike Parsons for Lieutenant Governor" makes for a closer call. However, the Commission previously has opted against action in a similar circumstance. In Matter Under Review 6684, the Commission dismissed a complaint against Indiana gubernatorial candidate John Gregg and his campaign for a public communication that extensively attacked a Federal candidate and explicitly referred to his candidacy. Notwithstanding the Gregg

² The Complaint does not allege, and Respondents deny, that the mailer was authorized by or otherwise coordinated with any Federal candidate or committee.

¹ 52 U.S.C. § 30101(20)(iii), as incorporated by § 30125(f)(1). The Complaint appears to misread § 30125(f)(1) as incorporating § 30101(20)(ii).

⁴ FEC Adv. Op. 2003-25 at 4 (quoting 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

Pence campaigned actively in Missouri for the benefit of Grettens. See, e.g., Pence, Greitens to hold rallies in Springfield, St. Louis," The Missouri Times, Sept. 6, 2016 (http://themissouritimes.com/33308/pence-greitens-holdrallies-springfield-st-louis) ("Greitens will appear with presidential nominee Donald Trump's running mate in Springfield and St. Louis. The vice presidential hopeful has traveled across the country to bolster the Republican ticket and gather votes, though he has mostly stuck to swing states so far") (emphasis supplied). While the origin of the photograph at issue could not immediately be determined, it appears to have been taken during a stop in Missouri by Pence to assist Greitens' candidacy. As shown in public polls, Missouri was not a swing state at the presidential level, gubernatorial the http://www.tealclearpolitics.com/epolls/2016/president/mo/missouri_trump_vs_clinton_vs_jehnson_vs_stein-(Trump leading Clinton in Missouri by an average of II 6009.html http://www.realclearpolities.com/epolis/latest_polls/governor (Missouri gubernatorial race polling showing range of. Greitens losing by 16 points to winning by 1 point).

advertisement's numerous criticisms of U.S. Senate candidate Richard Mourdock – in his capacity as a candidate for U.S. Senate – including his alliance with the "Tea Party," and content citing Gregg's opponent, Mike Pence (it's a small world), discussing Mourdock's Senate candidacy, the Commission dismissed the Complaint.⁶

The Commission found it dispositive that the Gregg advertisement "focuses on the Indiana gubernatorial election" - this where most of the advertisement's content consisted of reference to a Federal candidacy, attacks on that Federal candidate, and a call to action to "stop the Tea Party" as personified by that Federal candidate. If the Gregg advertisement could be said to "focus" on the "gubernatorial election," certainly no less can be said of Greitens' mailer. Any reference to or depiction of a Federal candidate in the mailer should be seen in that context: association of a non-Federal candidate with a Federal candidate in order to influence the non-Federal election.

Finally, even if the Commission were to conclude that a technical violation of § 30125(f) occurred, it is difficult to see how enforcement under these circumstances would be constitutional. As pointed out separately by Commissioner Lee Goodman in MUR 6684. "section [30125(f)] is constitutionally dubious in light of Citizens United v. FEC and its progeny." Commissioner Goodman noted:

Section [30125(1)] imposes federal source and amount restrictions on state and local candidate committees – as a class of speakers – that PASO a candidate for federal office. It does not distinguish between coordinated communications and communications that are made independent of any federal candidate. Thus as with the challenged statute in *Citizens United*, "Congress has created [a] categorical ban[] on speech that [is] asymmetrical to preventing quid pro quo corruption." Accordingly, *Citizens United* raises serious constitutional doubt regarding the continuing validity of section [30125(1)].

The Commission should dismiss the Complaint and take no further action against Respondents.

Sincerely.

Michael G. Adams Counsel for Respondents

mulerel D

⁶ MUR 6684, Factual and Legal Analysis, Nov. 26, 2013.

^{&#}x27; Id. at 6.

^{*} MUR 6684, Statement of Reasons of Commissioner Lee E. Goodman. Mar. 26, 2014, at 3 (citation omitted).

⁹ Id. (internal citation omitted).